140-70
140-70

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 252.

THE ILLINOIS GRAND TRUNK RAILWAY COMPANY, APPELLANT,

vs.

JEPTHA H. WADE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 17, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 252.

THE ILLINOIS GRAND TRUNK RAILWAY COMPANY, APPELLANT,

vs.

JEPTHA H. WADE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	3	1
Exhibit A—An act to amend an act entitled An act to incorporate the Illinois Grand Trunk railway	7	5
B—Certificate of stock Illinois Grand Trunk railway to Walnut township—400 shares	8	6
C—Walnut township railroad bond	8	6
D—Walnut township railroad coupon	9	7
Amended answer of Grand Trunk Railway Co.	9	7
Answer of the town of Walnut	13	11
Abstract of proofs	14	12
Testimony of Jeptha H. Wade	14	12
Lewis C. Ellsworth	15	13
Alfred H. Castle	16	14
Stipulation as to certain facts	17	14
Stipulation as to transfer of stock, &c.	19	15
Final decree	20	15
Order allowing appeal, &c.	23	16
Appeal bond	24	17
Stipulation as to record on appeal	26	18
Clerk's certificate	27	18
Assignment of errors	28	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 25, 1890.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, on Friday, the twenty-fourth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and eleventh year.

WM. H. BRADLEY, *Clerk.*

J. H. WADE
vs.
THE TOWN OF WALNUT and ILLINOIS GRAND TRUNK RAILWAY. } In Chancery.

2 Circuit Court of the United States, Northern District of Illinois.

J. H. WADE
vs.
TOWN OF WALNUT and ILLINOIS GRAND TRUNK RAILWAY COMPANY. } In Chancery.

Pleadings and Abstract of Proofs.

Thos. S. McClelland, solicitor for complainant.
Dexter, Herrick & Allen, solicitors for defendant, Illinois Grand Trunk Railway.
Paddock & Aldis, solicitors of defendant, Town of Walnut.

3 Circuit Court of the United States, Northern District of Illinois.

J. H. WADE
vs.
TOWN OF WALNUT and ILLINOIS GRAND TRUNK RAILWAY COMPANY. } In Chancery.

Pleadings and Abstract of Proofs.

Bill.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court of the United States. May Term, A. D. 1885.

To the judges of said court, in chancery sitting:

Your orator, J. H. Wade, who is a citizen of the State of Ohio, brings this his bill of complaint against the Town of Walnut, a body corporate, organized under and by the virtue of the laws of the State of Illinois and located in Bureau county, in said northern district of Illinois; the Illinois Grand Trunk Railway, a citizen of said State of Illinois, and the Chicago, Burlington and Quincy

Railroad Company, a corporation organized and existing under the laws of Illinois and a citizen of said State of Illinois.

And thereupon your orator charges and says that on, to wit, on the 28th day of February, A. D. 1867, said Illinois Grand Trunk Railway Company was duly incorporated under and by virtue of an act of the Legislature of the State of Illinois entitled "An act to incorporate the Illinois Grand Trunk railway," approved and in force on the day last aforesaid.

That on, to wit, March 20, 1869, said Legislature passed a
4 further act entitled "An act to amend an act entitled 'An act to incorporate the Illinois Grand Trunk railway'" (a copy of which act is hereto attached, marked Exhibit "A").

That it was provided in and by said amended act that any incorporated town or township situated near or on the route of said Illinois Grand Trunk railway, west of the city of Mendota, might become subscribers to the capital stock of said railway and issue bonds for the amount of the stock subscribed, the proposition for such subscription having first been submitted to the inhabitants of such town or township at the election to be held in any such town or township and approved by a majority of the voters thereat.

That the said Town of Walnut is a body corporate and politic created under and by virtue of the township organization act of said State of Illinois and has been for more than twenty years last past, and is situated on the line of said Illinois Grank Trunk railway, west of said city of Mendota, and within the territory contemplated by said amended act.

That on, to wit, June 25, 1870, at an election duly and legally called and held in said town for that purpose, the legal voters of said town voted to subscribe thirty thousand dollars to the capital stock of said railway, and in payment therefor to issue the bonds of said corporation, payable in ten years, at ten per centum per annum.

That on the 6th day of August, 1870, another election was held in said town under said act, at which the legal voters of said town voted to subscribe the further sum of ten thousand dollars to the capital stock of said railway and issue the further sum of ten thousand dollars in bonds in payment therefor.

That on, to wit, February 1, 1871, the supervisor and town clerk of said town, acting under the orders and direction of said town and in pursuance of said two elections, did subscribe forty thousand dollars to the capital stock of said Illinois Grand Trunk railway and received a certificate therefor, which said certificate said town now holds and has held since said February 1, 1871, a copy of which is hereto attached, marked Exhibit "B;" that in payment for said stock said town, by its supervisor and town clerk, on, to wit, on said February 1, 1871, extended its four hundred bonds for the sum of one hundred dollars each, numbered consecutively from one to four hundred, payable in ten years, with interest at the rate of ten per cent. per annum, evidenced by ten coupon notes attached to each of said bonds. A copy of one of said bonds and one coupon at-

tached thereto, issued under said vote of August 6, 1870, are hereto appended, marked Exhibits "C" and "D."

That said bonds were of like tenor and effect and fac-similes of each other except as to their numbers, and said bonds numbered from 1 to 300 recited on their face that they were issued under said vote of June 25, 1869, and said bonds numbered from 301 to 400 recited on their face that they were issued under said vote of August 6, 1870.

Your orator further avers that he became on, to wit, March 1, 1871, the purchaser of a large number of said bonds numbered from 1 to 300 and *to* the whole of said bonds numbered from 301 to 400, in good faith, for a valuable consideration, before maturity, and without notice of any defenses to the same or to any or to either of them.

Your orator further avers that subsequent to his purchase of said bonds said town repudiated their payment; that in a suit brought by your orator against said town to determine the validity of said bonds numbered from 1 to 300 the Supreme Court of the United States held the same valid. See Walnut *v.* Wade, 103 U. S., 683.

That in a suit brought by your orator against said town to recover on said bonds numbered from 301 to 400 said Supreme Court held the same void. See Wade *v.* Walnut, 105 U. S., 1.

Your orator further avers that he has been wholly unable to realize anything out of said bonds numbered from 301 to 400, and that there is now due upon the same and the coupons attached to them over $23,000; that they were issued and delivered to said railway in payment of ten thousand dollars of the forty thousand dollars of stock issued as aforesaid by said railway to said town.

That the money paid by your orator for said bonds numbered from 301 to 400 was used, as your orator is advised and believes, in building said railway through said town.

That said The Chicago, Burlington and Quincy Railroad Company is now in possession of the line of road of said Illinois Grand Trunk railway running west from said city of Mendota and through said The Town of Walnut, operating the same and enjoying its franchises under a lease, as your orator is advised and believes, and through its officers and agents is in the control and management of said Illinois Grand Trunk railway and has operated the same, to wit, ten years last past.

Your orator further avers that said town has hitherto and still does refuse to pay said bonds numbered from 301 to 400 and the interest due on the same, but still remains in the ownership, custody, and control of the ten thousand dollars stock in said railway issued to said town in consideration of said bonds last mentioned.

That in equity and good conscience your orator ought to be subrogated to the right of said town in and to said ten thousand dollars capital stock in said railway.

That said ten thousand dollars in stock is incorporated in said certificate for $40,000 stock issued to said The Town of Walnut. Your orator is advised and believes that the people of said town are willing

that your orator should have and derive all the benefit and ad-
6 vantage which can be had or derived from said stock in the sum of ten thousand dollars, but the officers of said town refuse to deliver to said railway company said certificate for $40,000, and have issued in lieu thereof other certificates aggregating a like amount, and assign and set over to your orator ten thousand dollars thereof, standing for and representing so much of said stock as was issued to said town in consideration of said bonds numbered from 301 to 400, or in any manner assign or set over to your orator ten thousand dollars of the capital stock in said railway so held by said town as aforesaid.

Your orator further avers that he has no remedy in the premises except in a court of equity, where matters of this kind are properly cognizable.

Your orator further prays that said The Town of Walnut, The Illinois Grand Trunk Railway, and The Chicago, Burlington and Quincy Railroad Company may be made parties defendant to this bill and a summons issue out of this court directing them and each of them to be and appear herein on a day to be therein named, and that on a final hearing of said cause that your orator may be decreed to be the equitable owner of said ten thousand dollars of said forty thousand dollars capital stock of said railway held by said The Town of Walnut and justly entitled to the same upon the surrender to said town by your orator of said bonds Nos. 301 to 400 and the coupons attached thereto.

And that said town may be ordered, adjudged, and decreed to assign, transfer, and set over to your orator, upon the surrender of said bonds as aforesaid, ten thousand dollars of the capital stock aforesaid, and for that purpose that it surrender to the officers of said railway company or to the person or persons having power and authority to issue other certificates of stock in lieu thereof said certificate of stock for $40,000, and have or procure other certificates of like amount in the aggregate, and then assign, transfer, and set over to your orator ten thousand dollars par value of said stock, or that your honors may order, adjudge, and decree that so much of said certificates as represent and stand for said bonds 301 to 400, to wit, ten thousand dollars thereof, may be canceled and rendered null and void, and that said railway or its proper officers be ordered, adjudged, and decreed to cancel said certificate of stock for $40,000 to the extent of $10,000 on the books of said railway and issue to your orator in place thereof a certificate for the sum of $10,000 upon delivery by your orator of said bonds Nos. 301 to 400 for the use of said town.

And your orator prays for such other and further relief in the premises as may be equitable and just.

THOS. S. McCLELLAND AND
GEORGE A. SANDERS,
Solicitors for Compl't.

THOMAS S. McCLELLAND, *Of Counsel.*

7 EXHIBIT "A."

An act to amend an act entitled "An act to incorporate the Illinois Grand Trunk railway."

SECTION 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That any city, incorporated town, or township which may be situated on or near the route of the Illinois Grand Trunk railway west of the city of Mendota via Prophetstown to the Mississippi river may become subscribers to the stock of said railway and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions and on such conditions as they may choose and the directors of said company may approve, the proposition for said subscriptions having been first submitted to the inhabitants of such city, town, or township and approved by them, and upon application of any ten voters of any city, town, or township as aforesaid, specifying the amount to be subscribed and the conditions of said subscriptions, it shall be the duty of the clerk of such city, town, or township immediately to call an election, in the same manner that other elections for said city, town, or township are called, for the purpose of determining whether said city, town, or township will subscribe to the stock of said railway; and if a majority of said votes shall be "for subscription," then the corporate authorities of said city town, or township and the supervisor and town clerk of said township so voting shall cause said subscription to be made, and upon its acceptance by the directors of said company shall cause bonds to be issued in conformity with said vote, which bonds shall not be of less denomination than one hundred dollars and in no case bear a higher rate of interest than ten per cent., providing no such election shall be held until at least thirty days' previous notice thereof shall be given in the manner prescribed by law.

SEC. 2. It shall be the duty of the proper authorities of any city, town, or township issuing bonds as aforesaid to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing thereon, and to levy such taxes as may be necessary therefor as other taxes are levied by them.

SEC. 3. This act shall be liberally construed for the purposes intended and expressed therein, and shall be held to be a public act and shall be in force from and after its passage.

F. CORWIN,
Speaker of the House of Representatives.
J. DAUGHERTY,
Speaker of the Senate.

Approved March 25, 1869.

JOHN M. PALMER, *Governor.*

8 EXHIBIT "B."

Number —. *Illinois Grand Trunk Railway.* Shares 400.

This is to certify that Walnut township, Bureau county, Illinois, is entitled to four hundred shares of one hundred dollars each in the capital stock of the Illinois Grand Trunk railway, transferable only on the books of the company by its proper officers upon the surrender of this certificate.

In testimony whereof the said company has caused this certificate to be signed by its president and secretary, at the city of Chicago, this first day of February, A. D. 1871.

A. H. CASTLE, *President.*

L. C. ELLSWORTH, *Secretary.*

EXHIBIT "C."

Number 400. 100 dollars.

UNITED STATES OF AMERICA, *State of Illinois.*

Walnut Township Railroad Bond.

Know all men by these presents that the township of Walnut, in the county of Bureau and State of Illinois, is indebted to the Illinois Grand Trunk railway or bearer in the sum of one hundred dollars, lawful money of the United States, which the said township of Walnut promises to pay to the said Illinois Grand Trunk railway or to the bearer hereof on the first day of January, in the year one thousand eight hundred and eighty-one, at the National Bank of Commerce of New York, on the presentation of this bond, with interest thereon, from the first day of January, A. D. 1871, at the rate of ten per centum per annum, payable annually, at the office of the State treasurer, in Springfield, Illinois, on the first day of January in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is issued under and by virtue of the charter of said Illinois Grand Trunk railway and amendment thereto and other laws of the State of Illinois and in accordance with the vote of the electors of said township at the special election held August 6, A. D. 1870, in accordance with said — and amendment and laws.

In witness whereof the said township of Walnut has caused these presents to be signed by the supervisor and clerk of said township this first day of January, one thousand eight hundred and seventy-one.

M. KNIGHT,
Supervisor.
WM. LANDERS,
Town Clerk.

(Endorsed on back as follows, to wit:)

AUDITOR'S OFFICE, ILLINOIS.
SPRINGFIELD, *April 18th*, 1871.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

EXHIBIT "D."

$10. *Walnut Township Railroad Bond Interest Warrant.* No. 400.

Supervisor of Walnut township pay to the bearer, January 1st, 1881, ten dollars, at the National Bank of Commerce, New York.

M. KNIGHT, *Supervisor.*
WM. LANDERS,
Town Clerk.

Endorsed: Filed M'ch 28, '85. Wm. H. Bradley, clerk.

Order. Entered September 21, 1885.

On motion of complainant, this cause is dismissed as to the Chicago, Burlington & Quincy Railroad Company.

Amended Answer of The Illinois Grand Trunk Railway Company, Defendant.

This defendant, now and at all times hereafter reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint contained, for answer thereto or to so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, answering, says:

This defendant admits that on, to wit, the 28th day of February, 1867, this defendant was duly incorporated under and by virtue of an act of the Legislature of the State of Illinois entitled "An act to incorporate the Illinois Grand Trunk railway," approved and in force on said 28th day of February, A. D. 1867, and that on, to wit, March 20, 1869, said Legislature passed a further act entitled "An act to amend an act entitled An act to incorporate the Illinois Grand Trunk Railway" (a copy of which is attached to said bill, marked "Exhibit A"); and this defendant, for greater certainty, refers to the said original act incorporating this defendant and the said amendatory act, and prays that the same may be taken as a part of this answer.

This defendant, further answering, admits that the said town of Walnut is a body corporate created under and by virtue of the said township organization act of the said State of Illinois and has been for more than twenty years last past, and is situated on the line of said Grand Trunk railway west of the city of Mendota and within the territory contemplated by said amended act, and for greater certainty as to the powers of said town of Walnut this defendant refers to the said township organization act under which the said town is incorporated.

This defendant, further answering, admits that on, to wit, June 25, 1870, at an election duly called and held in said town for that purpose, the legal voters of said town voted to subscribe $30,000 to the capital stock of said railway and in payment therefor to issue the bonds of said town, payable in ten years, at ten per centum per annum; that on the 6th day of August, 1870, another election was held in said town, purporting to be held under said act, at which the legal voters of said town voted, on certain conditions, to subscribe to the capital stock of said railway company to the further amount of $10,000, to be paid for in the bonds of said town, and to issue the further sum of $10,000 in bonds in payment therefor; that thereafter, on, to wit, February 1, 1871, the supervisor and town clerk of said town or one of them, acting under the supposed authority of said act and said two elections, received from said Illinois Grand Trunk railway a certificate setting forth that said town of Walnut was entitled to 400 shares, of $100 each, in the capital stock of said Illinois Grand Trunk railway, a copy of which is attached to said bill, marked "Exhibit B," and that said town now holds and has held since said 1st day of February, 1871, said certificate; that under the supposed authority of said act and said two elections the supervisor and town clerk of said town, on, to wit, said February 1, 1871, delivered to said Illinois Grand Trunk railway, as payment for said subscription, the 400 bonds of said town for the sum of $100 each, numbered consecutively from 1 to 400, payable in ten years, with interest at the rate of ten per cent. per annum, evidenced by ten coupon notes attached to each of said bonds, and this defendant believes that said Exhibits "C" and "D" attached to said bill are true copies of one of said bonds and one coupon attached thereto issued under said vote of August 6, 1870; that said coupons were all of like tenor and effect and fac-similes of each other, except as to their numbers, and said bonds numbered from 1 to 300 recited on their face that they were issued under said vote of June 25th, 1869, and said bonds numbered from 301 to 400 recited
11 on their face that they were issued under the vote of August 6, 1870.

This defendant, further answering, says that it is not advised, save from the allegations of said bill, whether the complainant became the purchaser of a large number of said bonds numbered from 1 to 300 and of the whole of said bonds numbered from 301 to 400, or whether, if he in fact purchased the same, such purchase was made in good faith for a valuable consideration and without notice of any defenses, as alleged in said bill, and this defendant

therefore calls upon the complainant to make such proof of his allegations in that behalf as he is advised is material.

This defendant, further answering, admits that subsequent to the alleged purchase of said bonds by said complainant said town refused payment of said bonds on the ground that the same were not authorized by law and void; that in a suit brought by the complainant against said town to determine the validity of said bonds numbered from 1 to 300 the Supreme Court of the United States held the same valid, as by reference to said case of Walnut *v.* Wade, 163 U. S., 683, will more fully appear; that in a suit brought by the complainant against said town to recover on said bonds numbered from 301 to 400 said Supreme Court held the said supposed election of August 6, 1870, and the said bonds and the several acts of the officers of said town thereunder wholly void, as by reference to said case of Wade *v.* Walnut, 105 U. S., 1, will more fully appear.

This defendant, further answering, admits, upon information and belief, that said complainant has been wholly unable to realize anything out of said bonds numbered from 301 to 400, but this defendant is not advised what sum would be due on said bonds if valid, and therefore leaves the complainant to make such proof of his allegation in that behalf as he may be advised is material.

This defendant, further answering, admits that said bonds numbered from 301 to 400 were issued and delivered to said railway under and in pursuance of said subscription of August 6, 1870, under the supposed authority of said act of March 26, 1869, in supposed payment for $10,000 of the $40,000 of stock mentioned in said certificate issued to said town; and this defendant avers that the said town in making the said supposed subscription for said $10,000 of said stock and issuing its bonds therefor, and the said railway in receiving said subscription for said $10,000 of stock to be paid for in the said bonds of said company and in issuing said certificate for said stock and receiving the said bonds therefor, acted under the supposed authority of said act of March 26, 1869; and this defendant is advised that the action of said town in subscribing for said stock and of this defendant in accepting said subscription and issuing a certificate therefor was not au-
12 thorized by said act, but was in fact expressly prohibited by the constitution of the State then in force, and was and is wholly void.

This defendant, further answering, denies that the money paid by said complainant for said bonds numbered from 301 to 400 or any part thereof was used in building said railway.

This defendant, further answering, says that that portion of the railroad of this defendant running from Mendota to Prophetstown was constructed under a contract by James F. Joy, acting for the Chicago, Burlington and Quincy Railroad Company, with this defendant, whereby this defendant agreed, in consideration of the construction of said road and in payment therefor, to deliver to said Joy, acting for said Burlington and Quincy railroad, the first-mortgage bonds of this defendant to the amount of $960,000 and the municipal

bonds of certain towns (including said bonds of the town of Walnut numbered — 301 to 400) to the amount of $194,000; that thereafter and on the completion of that portion of this defendant's road included in said contract this defendant, in pursuance of said contract, did deliver to the said Chicago, Burlington and Quincy Railroad Company its first-mortgage bonds to the amount of $960,000 and the said municipal bonds, including said bonds numbered from 301 to 400; that thereafter, as this defendant is informed and believes, the Chicago, Burlington and Quincy Railroad Company sold the said bonds numbered from 301 to 400 on the market and realized therefor the sum of ninety cents on the dollar; and this defendant avers, on information and belief, that the said alleged purchase of said bonds by the complainant was made in the open market after the said sale of the same by the said Chicago, Burlington and Quincy Railroad Company or some person or persons to this defendant unknown.

This defendant, further answering, says that it admits, upon information and belief, that said town has hitherto and still does refuse to pay said bonds numbered from 301 to 400 and the interest due on the same, and that said town still has the custody of the said certificate for 400 shares of the capital stock of this defendant.

This defendant, further answering, says that it is not advised, save from the allegations of said bill, as to the alleged willingness of the people of said town that said complainant should have all the benefit and advantage which can be had from said certificate of stock so issued to it in the sum of $10,000, and leaves the complainant to make such proof of his allegation in that behalf, if material, as he may be advised; but this defendant admits that the officers of said town refuse in any manner to assign or set over to the complainant the said alleged $10,000 of stock, as alleged in said bill.

This defendant, further answering, denies that the complainant is the equitable owner of $10,000 of the capital stock of this defendant, as alleged in said bill, or is entitled to the relief prayed
13 in said bill or any part thereof, and this defendant insists that if the complainant is entitled to any relief against this defendant his remedy is complete and adequate at law.

This defendant, further answering, says that at the time of the filing of said bill there was a large amount of valid stock of this defendant which was held and has ever since been held by various persons and corporations.

This defendant, further answering, says that the said complainant has been guilty of laches, and by reason thereof is not entitled to the relief prayed in said bill or to any relief.

This defendant, further answering, says that the said alleged cause of action accrued to the complainant more than five years prior to the filing of said bill, and this allegation this defendant makes in bar of the complainant's bill, and prays the same benefit of this defense as if it had specially pleaded the same.

And this defendant denies all and all manner of unlawful combination, etc.

THE ILLINOIS GRAND TRUNK RAILWAY COMPANY,
By DEXTER, HERRICK & ALLEN, *Its Solicitors.*

DEXTER, HERRICK & ALLEN,
Sol'rs and of Counsel.

Endorsed: Filed June 10, 1887. Wm. H. Bradley, clerk.

Answer of the Town of Walnut.

This respondent, now and at all times saving and reserving all benefit of exception or otherwise to the manifold errors and insufficiencies in said bill contained, answering, says—

That it admits that $10,000 of the so-called bonds of this defendant mentioned in said bill as having been purchased by said complainant are null and void and have been so held by the Supreme Court of the United States, but as to the rights of the said complainant as holder of said bonds this defendant leaves the said complainant to make such proof as he may be advised to make. Respondent believes that the said bonds are numbered from 301 to 400, inclusive, but for greater certainty in that behalf respondent refers to the bonds when produced, if the same shall be material.

Respondent says, upon information and belief, that there was a stock certificate or purported stock certificate in the possession of some of the officers of respondent for the face amount of $40,000 of the capital stock of said Grand Trunk railway, but on like information and belief respondent shows that prior to the pendency of this suit as to respondent the supervisor of said town of Walnut sold to one Marion Knight, now of Cook county, Illinois, thirty
14 thousand dollars (or all but ten thousand dollars) of said stock and no more, at the same time placing said certificate in said Knight's possession, leaving respondent owner of only one-fourth of said stock, ever since which time respondent has had no actual possession of such stock certificate, and respondent says that it does not admit that said complainant is entitled to the relief prayed in said bill, but leaves him to prove the same as he may be advised, but if the court be of opinion that said complainant is entitled to said one-quarter of said stock respondent submits that any decree herein should be made at the cost of said complainant and upon equitable terms of surrender and cancellation as void of said illegal and void issue of bonds, and upon making all interested persons parties to such decree; and, having fully answered, it prays to be hence dismissed with its costs, etc.

THE TOWN OF WALNUT,
By PADDOCK & ALDIS, *Its Sol'rs.*

GEO. L. PADDOCK, *Of Counsel.*

COMPLAINANT'S EVIDENCE.

Deposition of Jeptha H. Wade, Complainant.

My name is Jeptha H. Wade; my age, seventy-four years; my occupation, president of the Citizens' Savings and Loan Association of Cleveland, Ohio; my residence, Cleveland, Ohio. I know the defendants to this suit in a general way and through the representations of the agents of whom I bought the bonds hereinafter referred to.

I am the owner of the bonds mentioned in the two bills filed in the two suits set out in the notice attached to this deposition. I purchased the Walnut township bonds here (Cleveland) in September, 1871, of Jacob R. Shepherd & Co., of Chicago, who were agents and brokers for the Illinois Grand Trunk Railway Company, and paid 92½ cents on the dollar for them, supposing they were good. I had no knowledge or suspicion there was any defect or irregularity in their issue. The Lamoille township bonds I bought here in 1871 and paid 99% for them. I think I bought them of the same firm, Jacob R. Shepherd & Co., but am not sure. If not of that firm it was some other who was selling them for the Illinois Grand Trunk railway. The said bonds were issued to the Illinois Grand Trunk Railway Company to aid in the building of said road and for the further consideration of an equal amount of stock of the said railway company issued to said townships respectively, which information I derived from the agents of the railway company of whom I bought the bonds at the time I bought them. The bonds were issued to the Illinois Grand Trunk Railway Company and by said railway company were put in the hands of its agents, of whom I bought them. This information I derived from the said agents at the time of purchase. I paid cash for them, supposing them to be good and valid in every particular. The money that I paid for the bonds was obtained from me upon the representation that it was to be used in the construction of the Illinois Grand Trunk railway. I purchased these bonds in perfect good faith and believed they were good and valid bonds. I had no knowledge or suspicion that they were not, or that there was any defense to them or any part of them. At the time of the purchase I paid for them in cash at the prices hereinbefore stated.

Answers to cross-interrogatories:

Most of my information was obtained from the agents from whom I bought the bonds. In answer to each interrogatory I have given the source of my information. All I know on the subjects inquired of, after the interrogatory as to my ownership of the bonds described in the two bills, beyond what was published to the public, I learned here from the parties of whom I bought the bonds at the time of the purchase.

Deposition of Lewis C. Ellsworth.

My name is Lewis C. Ellsworth; age, fifty-three years; I am not in business; my residence, Denver, Colorado. I have known the defendants to this suit for over fifteen years. I am not personally acquainted with the complainant. In the years 1870 and 1871 I lived in Chicago, Illinois, and during that time was secretary and treasurer of the Illinois Grand Trunk Railway Company and engaged in the construction of its road. The termini of the Illinois Grand Trunk Railway Company were Mendota, Illinois, and Prophetstown, Illinois. The road was constructed through the towns of Lamoille and Walnut, in Bureau county, Illinois.

The towns of Walnut and Lamoille became subscribers to the capital stock of the Illinois Grand Trunk railway in the sum of $40,000 and paid for the same in the bonds of said towns. Certificates of stock were issued to them, but I do not remember the date. The amount of bonds issued by each town was $40,000. The elections, in pursuance of which the bonds were issued, were held on June 25, 1870, and August 6, 1870. $30,000 of bonds were voted for and issued under the election of June 25, 1870, and $10,000 of bonds were voted for and issued under the election of August 6, 1870. Under the election held August 6, 1870, $10,000 in bonds were issued and delivered to me as treasurer of the Illinois
16 Grand Trunk Railway Company. Stock was issued to the towns in equal amounts. My recollection is the stock was issued to each town for the full amount of subscription of $40,000. I cannot say definitely, as the books and papers relating to said company were burned in the great fire in Chicago, in October, 1871. I am unable to give the dates of issue of the bonds of these towns. The bonds were delivered to me as treasurer of the Illinois Grand Trunk Railway Company. The bonds were delivered by me as treasurer of the Illinois Grand Trunk Railway Company to the Chicago, Burlington and Quincy Railroad Company, the latter company taking them as part payment for the money furnished to construct the road from Mendota to Prophetstown. The $10,000 of bonds voted by those townships on August 6, 1870, were delivered to the Chicago, Burlington and Quincy Railroad Company, as before stated. I know of no further facts within my knowledge regarding the issue of bonds by said towns under the election held in August, 1870, or the purposes of such issue.

Answers to cross-interrogatories:

Except as I have stated in my answers to the interrogatories in regard to the delivery by me as treasurer of the Illinois Grand Trunk Railway Company to the Chicago, Burlington and Quincy Railroad Company of the bonds, I do not remember of having any further personal connection or knowledge of these matters.

Defendant's Evidence.

Affidavit of Alfred H. Castle (taken as a deposition by stipulation).

That he was elected president of the Illinois Grand Trunk Railway Company in January, 1870; that he was president of said company at the time the municipal bonds in payment for subscriptions to the capital stock of said company were issued by the towns of Walnut and Lamoille and for some time subsequent thereto; that said bonds were all delivered by said company to the Chicago, Burlington & Quincy Railroad Company or its agents under a contract with James F. Joy, acting on behalf of said Burlington & Quincy Company; that none of said bonds were sold by said Illinois Grand Trunk railway or its agents; that, so far as affiant has any knowledge or information, Jacob R. Shipherd & Company did not act for the Illinois Grand Trunk Company in any way in connection with said bonds of the towns of Walnut and Lamoille in their sale or otherwise or in any other transaction.

17 *Stipulation as to Certain Facts.*

The following facts are stipulated between the parties to the above cause:

The municipal bonds issued by the towns of Walnut and Lamoille, referred to in the pleadings, were delivered by the Illinois Grand Trunk Railway Company to the Chicago, Burlington & Quincy Railroad Company. By the latter company they were forwarded to its assistant treasurer, in Boston, who sold or caused them to be sold on account of the Burlington & Quincy Company, as follows:

3,000 of the bonds of the town of Walnut, August 1, 1871, at 90 cents on the dollar; the remaining $37,000 of the bonds of the town of Walnut, in September, 1871, at 90 cents on the dollar; the $40,000 of the bonds of the town of Lamoille, in August, 1871, at 90 cents on the dollar.

The suit of J. H. Wade *versus* The Town of Walnut, reported in the 105 U. S. Rep., p. 1, was begun in the circuit court of the United States for the northern district of Illinois on the 4th day of April, 1879, and judgment was rendered therein in favor of the defendant, The Town of Walnut, on the 10th day of June, 1879.

At the time of the filing of the bills in the above causes a large amount of valid stock of defendant railroad company was held and has ever since been held by various persons and corporations.

18 Afterwards, to wit, on the tenth day of June, 1887, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

19 In Circuit Court of the United States, Northern District of Illinois.

J. H. WADE
vs.
TOWN OF WALNUT *et al.* } Bill.

In this case it is stipulated in evidence on the hearing in said case that on June 12, 1885, the said town sold and transferred to Marrion Knight three hundred shares of the 400 shares of Ill. Grand Trunk R. R. stock in said bill mentioned, for value received, and at the same time delivered to said Knight the certificate of said 400 shares, since which time said town has not had the actual possession or control of said certificate, but has ever since owned and now owns the residue of one hundred shares of such stock.

T. S. McCLELLAND,
Sol'r for Compl't.
PADDOCK & ALDIS,
Sol'rs for said Town.

Endorsed: Filed June 10, 1887. Wm. H. Bradley, clerk.

20 Afterwards, to wit, on the twenty-fourth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Decree.

J. H. WADE
vs.
THE TOWN OF WALNUT and ILLINOIS GRAND TRUNK RAILWAY. } In Chancery.

On this day come the parties to said cause, by their respective solicitors; and said cause coming on to be heard upon the bill of complaint and the amended answers of defendants, with the replications thereto, together with the proofs and stipulated facts, and the court, having heard arguments of counsel and being fully advised in the premises, doth find that the material allegations of said bill are true in substance and in fact.

And it appearing to the court that said Wade is the owner of ten thousand dollars, par value, of the bonds of said town issued under a vote of August 6, 1870, and that he acquired title thereto as alleged in said bill, and that said railway received the same, as
21 in said bill alleged, and that the same have been adjudicated void, and that the same were delivered to said railway for an equal amount, par value, of the stock of said railway and in payment therefor, and that said bonds were thereafter delivered by said railway to the Chicago, Burlington and Quincy Railroad Company in part payment for the construction of its road, and by said Chicago,

Burlington and Quincy Railroad Company were sent to its assistant treasurer, in Boston, and by him sold on account of said Chicago, Burlington and Quincy Railroad Company at ninety cents on the dollar, and thereafter were bought by said complainant of Jacob R. Shipherd & Co. at ninety-two and one-half cents on the dollar, and that said town is now the owner and in possession of said stock of the par value of ten thousand dollars, being one hundred shares of one hundred dollars each, and that said Wade is ready and willing to surrender said bonds and coupons attached upon the assignment to him of said one hundred shares of stock;

And it appearing to the court that the certificate of stock executed and delivered by said railway to said town was for four hundred shares of the par value of forty thousand dollars, or thirty thousand dollars over and above said ten thousand dollars, which said excess
22 of thirty thousand dollars or three hundred shares *have* been sold and assigned to one Marion Knight and the manual possession of said certificate for four hundred shares given to said Knight, but that said town still remains the legal owner of said one hundred shares of the par value of ten thousand dollars claimed by said Wade:

Therefore it is hereby ordered, adjudged, and decreed that said complainant be, and he hereby is, declared to be the equitable owner of said one hundred shares of stock and subrogated to the rights of said town in and to the same.

It appearing to the court that all parties in interest are here present, it is ordered, adjudged, and decreed that said Illinois Grand Trunk railway make, execute, and deliver into court for the use of said Wade a certificate for said one hundred shares of its capital stock of the par value of ten thousand dollars, and transfer the same on its stock books from the account of said town to the account of said Wade within ten days from the entry of this decree, and that said town be forever estopped and restrained from claiming any right, title, or interest in or to said one hundred shares or assigning the same, and that upon such execution and delivery of stock said Wade or his counsel deposit in court for the use of
23 said town said bonds and coupons, the same to be delivered to said town or its counsel by the clerk on demand.

It appearing to the court that said town has been ready and willing to make this exchange of stock held and owned by it for its bonds, as prayed for in said bill, no costs will be taxed against it, but the costs of this suit will be taxed against said Illinois Grand Trunk railway and execution issued therefor.

Thereupon the defendant, The Illinois Grank Trunk Railway, prays an appeal to the Supreme Court of the United States, which is allowed on said railway filing its appeal bond in the penal sum of two hundred dollars, with security to be approved by the clerk of this court, within thirty days, and that said defendant railway file its certificate of evidence herein within the same time.

Afterwards, to wit, on the twenty-first day of July, 1887, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following to wit:

24 Know all men by these presents that the Illinois Grand Trunk Railway Company, a corporation organized and existing under the laws of the State of Illinois, as principal, and James C. Peasley, as surety, are held and firmly bound unto Jeptha H. Wade in the full and just sum of two hundred dollars ($200), to be paid to the said Jeptha H. Wade, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our respective successors, heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof the said The Illinois Grand Trunk Railway Company has caused its corporate name to be hereunto signed by its president and its corporate seal to be hereto attached, duly attested by its secretary, and the said James C. Peasley has hereunto set his hand and seal this 13th day of July, A. D. 1887.

Whereas on the twenty-fourth day of June, A. D. 1887, in a suit pending in the circuit court of the United States for the northern district of Illinois, between Jeptha H. Wade, complainant, and The Town of Walnut and The Illinois Grand Trunk Railway Company, defendants, the said circuit court did render its decree in said cause, from which said decree of said circuit court the said Illinois Grand Trunk Railway Company has prayed for and obtained an appeal to the Supreme Court of the United States:

25 Now, the condition of the above obligation is such that if the said The Illinois Grand Trunk Railway Company shall prosecute its appeal with effect and, moreover, pay the amount of all costs and damages rendered and to be rendered in case the said decree shall be affirmed by said Supreme Court of the United States, then the above obligation to be void; otherwise to remain in full force and virtue.

THE ILLINOIS GRAND TRUNK
RAILWAY COMPANY,
[SEAL.] By JNO. L. LESTER, *President.*
J. C. PEASLEY, *Surety.* [SEAL.]

Attest: L. O. GODDARD, *Secretary.*

Approved.
WM. H. BRADLEY, *Clerk.*

Endorsed: Filed July 21, 1887. Wm. H. Bradley, clerk.

Afterwards, to wit, on the eleventh day of October, 1887, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

26 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

J. H. WADE
vs.
THE TOWN OF WALNUT and THE ILLINOIS GRAND TRUNK RAILWAY COMPANY. } In Chancery.

It is stipulated that the record in the above-entitled cause on the appeal of said cause to the Supreme Court of the United States prayed by the defendant, The Illinois Grand Trunk Railway Company, shall consist of—

1. The printed copy of the pleadings and abstracts of proofs on file in said cause in place of and with the same effect as copies of the original pleadings and proofs.
2. Stipulation as to facts made on hearing of cause between complainant and defendant town.
3. The decree entered in said cause on June 24, 1887.
4. The appeal bond filed by said defendant, The Illinois Grand Trunk Railway Company.

THOMAS S. McCLELLAND,
Sol'r for Compl't.
DEXTER, HERRICK & ALLEN,
Sol'rs for Illinois Grand Trunk Railway Company, Defendant.
GEO. L. PADDOCK,
Sol'r for Town of Walnut, Defendant.

Endorsed: Filed Oct. 11th, 1887. Wm. H. Bradley, clerk.

27 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court under the stipulation filed October eleventh, 1887, in the cause wherein J. H. Wade is the plaintiff and The Town of Walnut and Illinois Grand Trunk Railway are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this thirteenth day of October, 1887.

WM. H. BRADLEY, *Clerk.*

28 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States. October Term, A. D. 1887.

THE ILLINOIS GRAND TRUNK RAILWAY Company (Impleaded with Town of Walnut), Appellant,
vs.
J. H. WADE, Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

And now comes The Illinois Grand Trunk Railway Company, appellant, by Wirt Dexter and John J. Herrick, its solicitors, and says that in the record and proceedings and in rendering the decree aforesaid there is manifest error, in this, to wit:

1. The court erred in finding that the town of Walnut is or was the owner of one hundred shares of the capital stock of the Illinois Grand Trunk Railway Company.

2. The court erred in decreeing that the appellee was the equitable owner of said one hundred shares of the capital stock of the Illinois Grand Trunk Railway Company.

29 3. The court erred in decreeing that the said appellee, J. H. Wade, be subrogated to the alleged rights of the town of Walnut in and to said one hundred shares of the capital stock of said Illinois Grand Trunk Railway Company.

4. The court erred in decreeing that the appellant, The Illinois Grand Trunk Railway Company, make, execute, and deliver into court for the use of said J. H. Wade a certificate for one hundred shares of its capital stock.

5. The court erred in decreeing that the appellant, The Illinois Grand Trunk Railway Company, transfer on its books a certificate for said one hundred shares of its capital stock to the account of said appellee, Wade.

By reason whereof appellant prays that said decree may be reversed, etc.

WIRT DEXTER,
JOHN J. HERRICK,
Solicitors for Appellant.

Endorsed on cover: N. Illinois C. C. U. S. No. 252. The Illinois Grand Trunk Railway Company, appellant, *vs.* Jeptha H. Wade. Filed October 17, 1887.

Office Supreme Court U. S.
FILED,
MAR 21 1891
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

THE ILLINOIS GRAND TRUNK RAILWAY COMPANY, *Appellant,*
vs.
JEPTHA H. WADE, *Appellee.*

No. 252.

ARGUMENT FOR APPELLANT.

JOHN J. HERRICK,
ATTORNEY FOR APPELLANT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

THE ILLINOIS GRAND TRUNK RAILWAY COMPANY, *Appellant*,
vs.
JEPTHA H. WADE, *Appellee.*
No. 251.

THE ILLINOIS GRAND TRUNK RAILWAY COMPANY, *Appellant*,
vs.
JEPTHA H. WADE, *Appellee.*
No. 252.

STATEMENT.

In the above cases (Nos. 251 and 252) the same questions arise on substantially the same facts, and the same argument is, therefore, filed in both.

In both cases bills in equity were filed by the appellee, Jeptha H. Wade. In No. 251 the bill was brought against The Illinois Grand Trunk Railway Company, the Chicago, Burlington and Quincy Railroad Company, and the Town of Lamoille, and in No. 252 against the same companies and the Town of Walnut. Subsequently the complainant dismissed as to the Burlington and Quincy

Company. Answers were filed by the towns and the Illinois Grand Trunk Railway Company, and a hearing was had on the pleadings and proofs. On the hearing decrees were entered granting the relief prayed, and the Railway Company has brought the cases, by appeal, to this court.

On the hearing the following facts were admitted or proved:

The Illinois Grand Trunk Railway Company was incorporated in 1867 under a special charter granted by the legislature of Illinois. By an amendment to the charter, passed in 1869, it was provided that any incorporated town on the route of the railway west of the city of Mendota might become subscribers to the capital stock of the railway, and issue bonds to the amount of stock so subscribed, the proposition for such subscription having been first submitted to the inhabitants of the town at an election, and approved by a majority of the voters. (Rec., 4.) On the 25th of June, 1870, at elections duly called, the Towns of Lamoille and Walnut, acting under the authority of this amendment to the company's charter, both voted to subscribe to the capital stock of the railway company, to the amount of $30,000, and to issue in payment for the subscription their bonds payable in ten years with ten per cent. per annum.

Certain sections of the Illinois constitution of 1870 were separately submitted to and adopted by vote of the people. One of these sections was as follows:

"No county, city, town, township or other municipality *shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation or loan its credit in aid of such corporation,* provided, however, that the adoption of this article shall not be construed as

affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipalities *prior to such adoption*." (Starr & Curtis Stat., Vol. 1, 167.)

This section was adopted and took effect July 2, 1870.

On August 6, 1870, another election was held in both towns, under the supposed authority of the same law, at which each town voted to subscribe the further sum of $10,000 to the stock of the railway company, and issue its bonds in payment for such subscription.

On February 1, 1871, the supervisor and town clerk of the town of Lamoille, in pursuance of the elections of June 25th and August 6th, subscribed to the capital stock of the railway company to the amount of $40,000, and in pursuance of this subscription executed and delivered to the railway company forty bonds of the town for the sum of $1,000 each, numbered consecutively from 1 to 40, and the railway company issued therefor a certificate for $40,000 of its capital stock.

On the same day, February 1, 1871, the supervisor and town clerk of the town of Walnut made a like subscription to the capital stock of the railway company, and in pursuance of the subscription executed and delivered to the railway company four hundred bonds of the town for the sum of $100 each, numbered consecutively from 1 to 400, and the railway company issued therefor a certificate for $40,000 of its stock.

The bonds were payable to bearer and were in the usual form of municipal bonds. (Rec., 51.) The bonds of Lamoille numbered from 1 to 30, and of Walnut numbered from 1 to 300, recited that they were issued under the vote of June 25, 1870, and the bonds of Lamoille

from 31 to 40, and of Walnut from 301 to 400, that they were issued under the vote of August 6, 1870.

The bonds thus received by the railway company were transferred by it to the Chicago, Burlington and Quincy Railroad Company under a contract with James F. Joy, acting on behalf of the Burlington and Quincy company, in part payment for money furnished to construct its road. (Rec., 14.) These bonds were forwarded by the Burlington and Quincy company to its assistant treasurer in Boston, who sold them on account of the Burlington and Quincy company as follows: $3,000 of the bonds of the Town of Walnut in August, 1871, and the remaining $37,000 in September, 1871, and the $40,000 of the bonds of the Town of Lamoille in August, 1871, all at ninety cents on the dollar. (Rec., 15.)

In September, 1871, the complainant bought of Jacob R. Shepherd & Co., in Cleveland, the Town of Walnut bonds, paying for them ninety-two and one-half cents on the dollar, and some time in 1871, of the same firm, the Town of Lamoille bonds, paying for them ninety-nine cents on the dollar. (Rec., 13.)

Wade testified that Shepherd & Co., in selling the bonds, represented to him that they were agents for the Illinois Grand Trunk Company and that the money received from him was to be used in the construction of the road. (Rec., 12.) The undisputed evidence, however, showed that Shepherd & Co. were not and never had been the agents of the Illinois Grand Trunk Company (Rec., 13, 14); and that the bonds were transferred by that company to the Burlington and Quincy company in part payment for advances, and sold by it, and having subsequently come into the hands of Shepherd & Co., were

sold by them in turn to complainant, Wade, at the dates and in the manner already stated. (Rec., 13, 14.)

The town refused to pay the bonds issued in payment of the subscriptions of August 6, 1870.

In a suit brought by Wade to recover on certain interest coupons attached to the Walnut bonds judgment was rendered in favor of the town. On appeal to this court the judgment was affirmed, (*Wade* v. *Walnut*, 105 U. S., 1,) the court holding, in accordance with the previous decisions of the Supreme court of Illinois, that the section of the constitution of 1870 prohibiting municipalities from subscribing to the capital stock of railway companies went into effect on July 2, 1870, and that, therefore, the subscriptions of August 6, 1870, were prohibited by the constitutional provision and void, and, for that reason, the bonds issued in pursuance of these subscriptions were also void.

This decision was rendered at the October term, 1881. On March 28, 1885, Wade filed the present bills.

Both bills were the same in form and substance, except as to the names of the towns and the numbers and denominations of the bonds. They alleged the incorporation of the Illinois Grand Trunk Company, the amendment of 1869 authorizing subscriptions to its stock by municipalities, the elections, the subscriptions to the stock, the issuing of the bonds, the purchases by the complainant, and the adjudication in *Wade* v. *Walnut*, that the bonds were void; that the complainant had been unable to realize anything from the bonds; that "the money "paid by your orator for said bonds was used, as your "orator is advised and believes, in building said railway "through said town"; that the town refused to pay the

bonds; that "in equity and good conscience your orator "ought to be *subrogated* to the rights of said town," to the $10,000 of stock subscribed for under the authority of the election of August 6th. The bills further alleged that "the officers of said town *refuse* to deliver to said "railway company said certificates for $40,000 and have "issued in lieu thereof other certificates aggregating a "like amount, and assign and set over to your orator "$10,000 thereof, standing for and representing so much "of said stock as was issued to said town in considera-"tion of said bonds numbered from 31 to 40, or to in any "manner assign or set over to your orator $10,000 of the "capital stock in said railway so held by said town as "aforesaid." (Rec., 3.)

The prayer of the bill in the Lamoille case (251) (which was the same as that of the bill in the Walnut case, except as to the name of the town and the numbers of the bonds), was that "your orator may be decreed to be the *equitable owner* of $10,000 of said $40,000 of the capital stock of said railway held by the said Town of Lamoille, and justly entitled to the same upon the surrender to said town by your orator of said bonds, numbers 31 to 40, and the coupons attached thereto," and that the court decree that "so much of said certificate as repre-"sents and stands for said bonds 31 to 40, to wit: $10,000 "thereof, may be canceled and rendered null and void, "and that *said railway, or its proper officers, be ordered, "adjudged and decreed to cancel said certificate of stock "for $40,000, to the extent of $10,000 on the books of "said railway, and issue to your orator in place thereof a "certificate for the sum of $10,000*, upon delivery by "your orator, for the use of said town, of said bonds "numbers 31 to 40." (Rec., 2–4.)

The Towns filed answers denying "that said vote conferred any authority on said town or its officers to make a subscription for the capital stock of said Illinois Grand Trunk railway, or any part thereof, or to issue said $10,000 in bonds."

The answers further averred that "as to the rights of said complainant, as holder of said bonds, this defendant leaves said complainant to make such proof as he may be advised to make; * * * that it (respondent) does not admit said complainant is entitled to the relief prayed in said bill, but leaves him to prove the same as he may be advised." (Rec., 7.)

Answers were filed by the Illinois Grand Trunk Company, denying the complainant's right to the relief prayed, and setting up:

(1) That complainant was not subrogated to the alleged rights of the town, and was not the "equitable "owner" of the $10,000 of capital stock, as alleged in the bill.

(2) That the action of the town in subscribing for the stock, and of the company in issuing it, was not authorized by law, but was, in fact, expressly prohibited by the constitution of the state then in force, and was wholly void.

(3) That the alleged cause of action accrued more than five years prior to the filing of the complainant's bill, and was, therefore, barred under the Illinois statute of limitations. (Rec., 9–12.)

The final decrees, which are the same in both cases *mutatis mutandis*, find that Wade is the "owner of "$10,000 par value of the bonds of said town issued "under a vote of August 6, 1870"; that "the same have "been adjudicated void, and that the same were delivered

" to the railway company for an equal amount par value " of the stock of said railway"; that the bonds were afterwards delivered to the Burlington and Quincy Company in part payment for the construction of the road, and by the Burlington and Quincy company were sent to its assistant treasurer, and by him sold on account of the Burlington and Quincy company at ninety cents on the dollar; that the Lamoille bonds were thereafter bought by the complainant of Jacob R. Shepherd & Co. at ninety-nine cents, and the Walnut bonds at ninety-two and one-half cents on the dollar; that " said town is now the legal " owner and in possession of said stock, being one hun- " dred shares of the par value of $10,000."

The decretal part is as follows; " It is hereby ordered- " adjudged and decreed that said Wade be, and he here- " by is declared to be the *equitable owner* of and entitled " to the possession of said one hundred shares of stock so " held and in possession of said town, and he is hereby " *subrogated* to the rights of said town in and to the same." that " said Illinois Grand Trunk Railway Company " make, execute and deliver into court, for the use of " said Wade, a certificate to said Wade for said one hun- " dred shares of its capital stock of the par value of " $10,000, and transfer the same on its stock books " from the account of said town to the account of said " Wade," and that " upon such execution and delivery of " stock, said Wade, or his counsel, deposit in court for " the use of said town said bonds and coupons "; and that the costs of the suit be taxed against the railway company and execution issue therefor. (Rec., 16.)

ASSIGNMENT OF ERRORS.

1. The court erred in finding that said Town of Walnut is or was the owner of one hundred shares of the capital stock of the Illinois Grand Trunk Railway Company.

2. The court erred in decreeing that the appellee is or was the equitable owner of one hundred shares of the capital stock of the Illinois Grand Trunk Railway Company.

3. The court erred in decreeing that said appellee, J. H. Wade, be subrogated to the alleged rights of the Town of Walnut in and to said one hundred shares of the capital stock of said Illinois Grand Trunk Railway Company.

4. The court erred in decreeing that the appellant, the Illinois Grand Trunk Railway Company, make, execute and deliver into court, for the use of said Wade, a certificate for one hundred shares of its capital stock.

5. The court erred in decreeing that the appellant, the Illinois Grand Trunk Railway Company, transfer on its books a certificate for said one hundred shares of its capital stock to the account of said appellee, Wade.

6. The court erred in not dismissing the bill for want of equity.

7. The court erred in decreeing that the appellant, the Illinois Grand Trunk Railway Company, pay the costs of the suit.

ARGUMENT.

I.

THE COMPLAINANT FAILED TO ESTABLISH HIS ALLEGED EQUITABLE TITLE TO THE SHARES OF STOCK DECREED TO BE ISSUED TO HIM.

The facts on which the complainant's claim to relief rests, shortly stated, are these: The towns under the supposed authority of the act of 1869 and the elections of August 6, 1870, each subscribed to the capital stock of the railroad company to the amount of $10,000, and issued their bonds in payment for such subscriptions receiving certificates of stock in return. These bonds were transferred by the railroad company to the Burlington company in part payment for advances of money. The Burlington company, in turn, sold them on the open market at ninety cents on the dollar, and, after passing from hand to hand, they were ultimately bought by the complainant Wade, from Shepherd & Co., the Lamoille bonds at ninety-nine cents on the dollar and the Walnut bonds at ninety-two and one-half cents. The towns refused to pay the bonds and thereupon the complainant brought suit on them, and was defeated, this court holding that the subscriptions for the $10,000 of stock were not only not authorized by law, but contrary to an express prohibition of the constitution of the state, and, therefore, void, and for that reason the bonds issued in payment were void. The complainant having thus failed to collect the $10,000 of bonds which he bought, the court below decreed that by reason of these facts he became the "equitable owner" of $10,000 of the capital stock of The

Illinois Grand Trunk Company, that that company should issue to him a certificate therefor on his surrendering to the town the $10,000 of bonds which he bought of Shepherd & Co.

There is no pretence that the complainant entered into any contract with Shepherd & Co. or any other person to purchase any interest, legal or equitable, in any stock of The Illinois Grand Trunk Company, or that the complainant ever had a thought that he was acquiring any such interest. In fact the undisputed evidence shows that Shepherd & Co. had no relations as agents or otherwise to the only parties, who it is pretended had any interest in this stock, at the time of the transaction out of which the complainant's alleged title to it grew. They were simply purchasers of $10,000 of bonds of the Towns of Lamoille and Walnut which the Burlington and Quincy company having acquired for a valuable consideration, had previously sold in the open market, and which they, in turn, sold at an advanced price to the complainant. The only persons whom the complainant knew in the transaction—Shepherd & Co.—are not even made defendants to the bill. There is no pretence of any express contract between the complainant and even Shepherd & Co.—much less either of the defendants—as to this stock or otherwise, nor can there be any pretence that the complainant paid to either of the defendants or any agent of theirs any money or other valuable consideration, from which even an implied contract would arise.

The alleged right to relief must, therefore, rest on some ground which is independent of any dealings between the complainant and either of the defendants, and wholly independent of any contract, express or implied.

The only theory on which it has been suggested that the relief could be sustained is that stated in the original bill, that by the void subscription and the issue of the void bonds the town became the owner of the $10,000 of stock, and that the complainant having purchased these void bonds "ought to be *subrogated* to the rights of said "town in and to said $10,000 of capital stock of said "railway." (Rec., 16.) This was the only ground urged by counsel for complainant in the court below, and was expressly embodied by the court in its decree. The decree adjudged that "said Wade be, and he "hereby is declared to be the *equitable owner* of and "entitled to the possession of said one hundred shares of "stock so held and in possession of said town, and he is "hereby *subrogated* to the rights of said town in and to "the same." (Rec., 16.)

Waiving, for the purposes of this branch of the discussion, the question as to what rights the town itself acquired by reason of the void subscription and assuming, as the complainant's case necessarily does, that the town acquired a *title* to one hundred shares of the stock, the complainant must establish that he has succeeded to this *title*, before he can ask a decree that the railway company issue to him a certificate for one hundred shares of its stock. There is no pretence that either of the towns has at any time made any sale or other transfer to him of such interest as it may have in the stock. On the contrary, the complainant's bill expressly avers that: "the officers of said "town refuse to deliver to said railway said certificates "for $40,000, and have issued in lieu thereof other cer-"tificates aggregating a like amount, and assign and set "over to your orator $10,000 thereof, * * * or to

" in any manner assign or set over to your orator $10,-
" 000 of the capital stock of said railway so held by said
" town, as aforesaid." (Rec., 3.)

The case of *Ætna Life Insurance Company* v. *Middleport*, 124 U. S., 532, decided by this court since the decrees in these cases were rendered, is fatal to the complainant's claim. The facts on which that case arose, so far as material, were identical with those of the cases now before the court. The relief was sought on the same ground of subrogation, and in an elaborate and able opinion by the late Justice Miller it was held that the bill was properly dismissed for want of equity. The facts of the case were these:.

In 1867 the town of Middleport, under the authority of a statute of Illinois, which authorized towns to vote aid, etc., to the Chicago, Danville and Vincennes Railroad Company, voted an appropriation of $15,000 in aid of the construction of the road and to levy a tax for its payment. The company accepted the appropriation and, on the faith of it, constructed its road. In 1871 the board of town auditors adopted a resolution reciting the vote to aid the company, and providing that the board of auditors issue the bonds of the town to the amount of $15,000 in payment. In pursuance of this vote, the bonds were duly executed and delivered to the company. These bonds, having been sold by the company, were subsequently purchased in the open market by the Ætna Life Insurance Company. The bonds having been adjudged void by the Supreme court of Illinois (*Middleport* v. *Ætna Life Insurance Company*, 82 Ill., 562), the company filed a bill, making the railroad company and the town defendants and praying to be subrogated to the rights of the railroad company in the appropriation made

by the town. It was claimed and clearly established that the vote by the town and its acceptance by the railroad company constituted a valid contract, which entitled the railroad company to enforce the appropriation, and the contention was that the bonds received in payment having been adjudged void, the insurance company, as their holder, was entitled to be subrogated to the right of the railroad company to enforce the appropriation. This contention was urged on the precise grounds which are rged in the cases before the court. (See p. 539.) This court held that the doctrine of subrogation had no application, and there could, therefore, be no recovery.

In the opinion of the court, numerous authorities are cited, and the law of subrogation is ably reviewed, and the principles which govern its application are clearly defined. For this reason, and in view of the identity of the material facts with those of the cases before the court, we shall quote at length from the opinion as the best and most decisive argument which can be made.

The court say:

"The Circuit court held that the statute of limitations was a bar to the present suit, and dismissed the bill on that ground.

But we regard the primary question, whether the complainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction *does not authorize such subrogation.*

The bonds in question in this suit were delivered by the agents of the town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no endorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation

which the company might have had to enforce the appropriation voted by the town. * * *

The argument of the learned counsel in the case is based entirely upon the right of the complainant to be *subrogated* to the rights of the railroad company by virtue of the principles of equity and justice. He does not set up any claim of an express contract for such subrogation. * * *

He founds his argument entirely upon the proposition that when the complainant purchased these bonds it thereby paid the debt of the town of Middleport to the railroad company, as voted by it, and that because it paid this money to that company on bonds which are void, it should be subrogated to the right of the company against the town.

The authorities on which he relies are all cases in which the party subrogated has actually paid a debt of one party due to another, and claims the right to any security which the payee in that transaction had against the original debtor. But there is no payment in the case before us of any debt of the town. The purpose of the purchase, as well as the sale of these bonds, and what the parties supposed they had effected by it, was not the payment of that debt, but *the sale and transfer of a debt of the town from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing by this transaction the debt of the town. It was very clear that it was a debt yet to be paid, and the discount and interest on the bonds was the consideration which induced the complainant to buy them.*

The language of this court in *Otis et al.* v. *Cullum, Receiver*, 92 U. S., 447, is very apt, and expresses precisely what was done in this case. In that case Otis & Company were the purchasers of bonds of the city of Topeka from the First National Bank of that place. These bonds were afterwards held by this court to be void for want of authority, just as in the case before us. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money paid to it for the bonds. After referring to the decision of *Lambert* v. *Heath*, 15 Meeson & Welsby, 486, this court said:

'Here, also, the plaintiffs in error got exactly what they intended to buy and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him.' * * *

In the present case there was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation, which had been voted in aid of the construction of its road.

The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town, to pay that sum to any holder of these bonds.

Litchfield v. *Ballou*, 114 U. S., 190, sustains this view of the subject. That town had issued bonds for the purpose of aiding in the construction of a system of waterworks. In that case, as in *Louisiana* v. *Wood*, the bonds

were so far in excess of the authority of the town to create a debt that they were held by this court to be void in the case of *Buchanan* v. *Litchfield*, 102 U. S., 278. After this decision, Ballou, another holder of the bonds, brought a suit in equity upon the ground that, though the bonds were void, the town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. It was also attempted in that case to establish the proposition, that, the money of the plaintiffs having been used in the construction of the water-works, there was an equitable lien in favor of the plaintiffs on those works for the sum advanced. This was also denied by the court.

"One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.

"But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Ætna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the town work out their own relations to each other, it could have suffered no harm and no loss.

There was no obligation on account of which, or reason why the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company.

These propositions are very clearly stated in a useful monograph on the Law of Subrogation, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from the civil law, and 'it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. * * * It takes place for the benefit of a third person, who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor, or surety who has paid the debt which ought, in whole or in part, to have been met by another.' Sheldon on Subrogation, paragraphs 2, 3.

In section 240 it is said: 'The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to doso for the preservation of any rights or property of his own.' * * *

In *Gadsden* v. *Brown*, Speer's Eq. (So. Car.), 37, 41, Chancellor Johnson says: 'The doctrine of subrogation is a pure unmixed equity, having its foundation in the

principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty *to elect whether they would or would not be bound;* and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty.'

This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

* * * * *

"No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's indorsement, and as a matter of business. The complainant company has, therefore, no right to the subrogation which it sets up in the present action."

It will be seen that, in the foregoing opinion, the court bases its conclusion that there could be no subrogation on two distinct grounds:

(1.) That to entitle a party to subrogation it must appear that he has actually paid a *debt* of one party to another, and that by reason of such *payment* he claims the right to some security which the payee in the transaction had against the original debtor; that in the transaction of the purchase of the bonds by the insurance company there was no intention to pay any *debt* of the town; but, on the contrary, the only purpose was to transfer the void bonds of the town from one party to another.

(2.) That an essential condition of the right of subrogation is that the party claiming it must not only have paid the debt of another, but that "he must have done "this under some necessity to save himself from loss "which might arise or accrue to him by the enforcement "of the debt in the hands of the original creditor"; that the payment by the Ætna company was "a voluntary "interference of the Ætna company in the transaction"; that "it had no claim against the town of Middle-"port;" and "if it had stood off and let the railroad com-"pany and the town work out their own relations to each "other, it would have suffered no harm and no loss."

This case should be decisive of the cases at bar.

The facts on which the claim of the alleged right of subrogation arose, so far as material, were identical with those of the cases before the court, and both of the grounds, on which it was held that there should be no subrogation, apply equally here.

(1.) There was the same purchase of bonds of the town in the open market, and subsequent adjudication that the bonds were void. There was the same intention to transfer from the seller to the purchaser these bonds, as the evidences of the supposed indebtedness of the town and the same absence of intention by the purchaser, to extinguish any debt of the town. There has been the same express adjudication that there was not in fact any indebtedness to be extinguished and that no contract, express or implied, arose or could arise out of the issue of the bonds. For the reason, therefore, that there was no payment of any *debt* of the town by the complainant, there is no more basis in this case for the alleged right of subrogation than in the *Ætna* case.

The language of the court in the *Ætna* case is equally pertinent here:

"There is no payment in the case before us of any *debt* of the town. The purpose of the purchase, as well as the sale of these bonds, and what the parties supposed they had effected by it, was not the *payment* of that debt, but the sale and transfer of the debt from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing, by this transaction, the debt of the town. It was very clear that it was a debt *yet to be paid*, and the discount and interest on the bonds was the consideration which induced the complainant to buy them. * * *

In the present case there was no borrowing of money. There was nothing which pretended to take that form. * * * It (the town) simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation, which had been voted in aid of the construction of its road.

The whole transaction of the execution and delivery of these bonds was utterly void. *They conferred no right upon anybody.*"

The language of this court in *Otis* v. *Cullum* (92 U. S., 447), quoted with approval in the *Ætna* case is also pertinent in this: "The plaintiffs in error got exactly what they intended to buy and did buy. They took no guaranty. * * * Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part, that they belong to him and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection he must take a guaranty."

(2.) The second reason given in the *Ætna* case is equally applicable in this. Substituting the complainant Wade for the Ætna Company, and the Towns of Lamoile

and Walnut for the Town of Middleport, the following language of this court in the *Ætna* case is conclusive of this:

"One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor. That, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. * * * But, even if the case here could be supposed to come within the rule which requires the payment of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Ætna Company in the transaction. It had no claim against the town of Middleport, it had no interest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the town work out their own relations to each other, it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds."

In fact, there is an additional and decisive reason for denying the claim to subrogation in the cases at bar which did not exist in the *Ætna* case.

In the *Ætna* case the complainant sought to be subrogated to the rights of the railroad company. In the case before the court he asks to be subrogated to the rights of the town. Subrogation, as the *Ætna* case holds and the

authorities there cited show, is the substitution of the party seeking subrogation in the place of the *creditor*, whereby he succeeds to the rights of the *creditor* against the *debtor*. In the *Ætna* case there was a plausible ground for the claim of subrogation in the fact that there was an *indebtedness* to the railway company, created by the vote of appropriation and its acceptance by the railway company, and that the complainant asked to be subrogated to the rights of the railway company, the *creditor* in that transaction, against the *debtor*, the town. Here, if any indebtedness was created it was by the contract of subscription. The attempted subrogation is to the supposed rights of the *debtor*, the town, against the *creditor*, the railway company, and for that reason the case is demonstrably not one of subrogation. A subrogation to the rights of the *debtor* is a contradiction of terms.

In fact, the complainant is not asserting any claim to subrogation for the only purpose for which there can be subrogation, the collection of a *debt*—but is asserting all the rights of a purchaser of the stock without having purchased it. And this, too, notwithstanding the fact that there is no necessary relation between the amount paid by him for the void bonds and the value of the stock. The bonds might have cost him ten cents on the dollar and the stock might now be worth three hundred cents, or *vice versa*, and his alleged rights would be the same.

Having gone into the open market and bought certain municipal bonds, taking no guaranty, and the bonds having been subsequently declared void, he now asks a court of equity to declare that, although he only contracted to buy and only intended to buy municipal bonds, he in fact bought shares of stock in a railroad company. He thus in effect asks the court to declare that the success of his

venture will not depend (as he supposed it would when he made the purchase) on the value and validity of the bonds he bought, but on the value and validity of certain shares of railroad stock he did not buy or even suppose he was buying, which must depend, in turn, not on the elements which enter into and determine the value of municipal bonds, but on the wholly different elements which enter into and determine the value of shares of railroad stock.

The main argument urged in the court below was that because the railroad company sold the bonds to the Burlington company, and thereby obtained money with which to build its road, and because the town, having successfully repudiated its subscription, cannot now claim the benefit of the stock, it is inequitable that complainant should bear the loss, and the railroad company have the benefit of its railroad. Therefore, mark the logic, the railroad company should be decreed not to repay the money, which, the argument assumes, it has inequitably received, to the Burlington company, from which it received it, but to issue to complainant, with whom it has had no dealings, one hundred shares of its stock, necessarily based on the void and prohibited subscription.

There are two answers to this argument:

(1.) Obviously, such equity as the complainant has must be an equity growing out of the facts of the transaction of his purchase of the bonds. If any injustice has been done him, it has been in obtaining his money on the faith of his supposed purchase of the void bonds. He bought no stock. If he has any equity, it must be an equity to recover back the money he paid for the void bonds. But this money he paid to neither of the defendants. If he has any right of action, it should be to recover from his sellers, Shepherd & Co., who should be

called upon to repay to him what he has paid to *them*. It was with them that he dealt, and they could be held to account, not merely for the ninety cents which the Burlington company got, but the ninety-nine cents (representing a nine per cent. profit) which Shepherd & Co. got. And on this theory, Shepherd & Co. would, in turn, have their right of action over against the parties to whom they had paid their money, and so on, until the Burlington company should recover from the Grand Trunk Company the money which it received and retains the benefit of (on the theory of complainant) unjustly. If the recovery is to be based on some general notion of equity and justice, obviously this is the logical and appropriate remedy.

But this suit is brought for no such purpose. The only persons who received any money from complainant are not even made defendants, and the remedy, if any, to recover the money would be by an action at law. (*Litchfield* v. *Ballou*, 114 U. S., 190.)

If it be said that this court has held in *Otis* v. *Cullum*, *supra*, that a person who buys a municipal bond in the open market without requiring any guaranty, cannot recover against his seller, and that, therefore, there would be no right of action in favor of the complainant to recover the money which he paid, the answer is, that in so deciding this court has held that the purchaser of bonds under such circumstances has no equity. The precise ground of the *Otis* case was that the purchaser got all he bargained for. He could have insisted on a guaranty or refused to purchase, but in purchasing without a guaranty he took his chances. He bought for the profit which there was in the discount and the interest. The precise claim in the *Otis* case was that the

plaintiff was entitled to recover his money *ex equo et bono*, and the precise ruling was that he was not so entitled.

In this view how stands the argument?

Complainant paid his money to Shepherd & Co. under such circumstances that the law says he has no right of action against them. The bonds which he purchased from Shepherd & Co. were wholly void, and, therefore, their purchase created no relation between him and the towns. As this court said in the *Ætna* case:

"The whole transaction of the execution and delivery of these bonds was utterly void. * * * *They conferred no right upon anybody*, and, of course, the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds."

If no wrong was done complainant in the transaction of the sale of the bonds, and he therefore has no right of action against Shepherd & Co. with whom he dealt, and if no relation was created between him and the towns by his purchase of the void bonds, what basis can there be for his supposed right of action?

(2.) This precise argument was urged to this court in *Ætna Life Insurance Co.* v. *Middleport*, *supra*. In that case, the town, under the authority of an admittedly valid law, had voted an appropriation in aid of the railroad, and the company, on the faith of the appropriation had built the road, and the town had got the benefit of it. There was an admittedly valid contract by the town to pay $15,000 to aid in the construction of the road. Counsel for the insurance company argued (p. 539–542):

"Having sold the bonds and received the money on them, it would be inequitable for the railroad company to still enforce the contracts for its own benefit. It there-

fore holds them as trustee for our benefit. * * * The towns cannot complain that we are subrogated to the rights of the railroad company under these contracts, for we must bear in mind that in this case the liability of the town was fixed by the election, as held in *Chiniquy* v. *People* and *Fairfield* v. *Gallatin County*, *supra*. It is liable to somebody, either the railroad company or to us as the equitable assignee or successor of that company. It makes no difference to the town to which it is liable. We bring it and the company into a court of equity asking to have the liability declared and established in us by subrogation. If the railroad company makes no objection to this, certainly the town cannot demur."

The argument could not be put more strongly. The answer which this court gave to it in the *Ætna* case is the sufficient answer to it in this, that the complainant has failed to establish his alleged right of subrogation. The question is not, what are the equities between the town and the railroad company, or the railroad company and the Burlington company, but has the complainant established his alleged title to the stock of which he asks the court to decree he is the owner?

He does not pretend that he has bought the stock. He does not pretend that either the town or railway company has made any transfer of it to him. We have shown that the only theory on which he bases any claim to his alleged equitable title, that of subrogation, utterly vanishes in the light of the fundamental principles on which the right to subrogation rests and the express decision of this court in *Ætna Insurance Company* v. *Middleport*, *supra*.

The mere fact that the complainant has failed to collect his money from the towns, or that all legal remedies have failed him, is no reason why a court of equity should create a remedy for him. Courts of equity proceed ac-

cording to fixed principles and recognized methods of procedure as much as courts of law.

In *Rees* v. *City of Watertown*, 19 Wall., 107, this court say:

"The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. * * * It (a court of chancery) cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge STORY says: 'There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate,' of which he cites many instances. * * *

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels."

In *Heine* v. *Levee Commissioners*, 19 Wall, 655, the court say:

"The total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief. Such relief as is consistent with the general law of the land, and authorized by the principles and practices of the courts of equity, will, under such circumstances, be administered. But the hardship of the case, and the failure of the mode of procedure established by law is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles."

It was argued in the court below that the question as to the complainant's right to the subrogation claimed could not be raised by appellant, the railroad company.

Why not? The railroad company was a necessary party to the suit. Affirmative relief was asked and decreed against it. The bill prayed and the court decreed that "said Illinois Grand Trunk Railway *make, execute* "*and deliver* into court for the use of said Wade *a* "*certificate for said one hundred shares of its capital stock* "of the par value of $10,000 and transfer the same on "its books," and that the costs of the suit be taxed against it and execution issue therefor. (Rec., 16.) In other words, the court in effect decreed that the company "make, execute and deliver" to complainant a binding instrument, certifying his *title to* and *ownership of* one hundred shares of its capital stock, which when thus "made, executed and delivered" would afford the same evidence of title and ownership as against the company, as its deed or bill of sale of real or personal property.

Complainant must recover like any other complainant, not on any alleged weakness of the title of the railroad company or the town, but on the strength of *his own* alleged title. His bill alleges and the decree find that he was "subrogated" to the rights of the town, and thereby became the "equitable owner" of one hundred shares of the railway company's stock. If he has established that by reason of the facts alleged (1) he was "subrogated" to such rights as the town had, and (2) that the town was the "owner" of one hundred shares of appellant's stock, then he has established his title of "equitable owner," and the decree (aside from the question of the statute of limitations hereafter discussed) is right. If he has not established this by the facts alleged and proved, then he has failed to establish his alleged *title*, and is in the position of any other complainant who has failed to make out his case.

We shall contend hereafter that, under the repeated ad-

judications of this court and the Supreme court of Illinois that the subscription by the town to the stock of the railroad company and the issue of its bonds in payment were wholly void, the certificates of stock issued to the town as the evidence of this void subscription and void payment are alsc wholly void. It is vital to the oomplainant's case to establish that there was a valid issue of stock to the town—but to render the question of the validity of the stock material he must first establish his own title—his alleged subrogation to the rights of the town.

II.

THE CONTRACT BY WHICH IT IS CLAIMED THE TOWN BECAME THE OWNER OF THE $10,000 OF STOCK OF THE COMPANY, WAS PROHIBITED BY LAW AND VOID.

The whole case rests upon a claim that by the transaction in evidence the town became the holder of $10,000 of the stock of the company.

Stock can be created only by contract. To create the relation of stockholder there must be a subscription, or its equivalent, and an acceptance by thecorporation. The subscription and its acceptance make the subscriber a stockholder. No certificate of stock is necessary to create the relation, and the certificate, if issued, is only evidence of it.

In Wood's Railway Law (section 20), the author says:

"When the subscription is accepted by the corporation, the subscriber becomes a stockholder, although no certificate is issued to him, and *thereupon* becomes liable as and entitled to all the privileges of a member."

And again, in section 21:

"The rule may be said to be that to make a person a shareholder in a corporation where he has subscribed for the stock, *it is not necessary that he should have received the certificate.*"

Cook on Stock and Stockholders (section 10) says:

A certificate of stock "operates to transfer nothing from the corporation to the shareholder, but *merely affords the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock, but merely a written evidence of the ownership of shares.* * * * And even as evidence it is not in every case essential; it is merely a convenient voucher which the shareholder has a right to receive if he asks for it."

Hence it has been held that a subscriber may be a stockholder and vote at an election of directors, although no certificate of stock has been issued to him.

Beckett v. *Houston*, 32 Ind., 393.

So in an action by the corporation to recover assessments from the stockholders, it is not necessary that a certificate should have issued to constitute the defendant a stockholder.

Chester Glass Co. v. *Dewey*, 16 Mass., 94.

So a subscriber to stock of a corporation to whom no certificate has been issued, is a stockholder within the meaning of an act making the stockholders individually liable for the debts of the company.

Spear v. *Crawford*, 14 Wend., 20.

So the stock of a subscriber to whom no certificate has been issued is liable to levy under a statute making stock in a corporation subject to levy.

Chaffin v. *Cummings*, 37 Me., at 83.

A town being a municipal corporation has no power to subscribe to the stock of a railroad company without express legislative authority.

Pierce on Railroads, 87.

Town of East Oakland v. *Skinner*, 94 U. S., at 258.

The bill alleges and the proof shows that this subscription was made by the town, and accepted by the railroad company under the supposed authority of an act of the legislature of Illinois, approved March 25, 1869, entitled: "An act to amend an act entitled 'an act to in-"corporate the Illinois Grand Trunk Railway.'" Section 1 of this act authorizes certain towns to become subscribers to the stock of the railway, and issue bonds in payment "under such limitations, etc., as they may "choose, *and the directors of said company may approve*," and provides that if a majority of the votes at an election held for the purpose shall be for subscription, "the "supervisor and town clerk of said town so voting shall "cause said subscription to be *made, and, upon its accept-"ance by the directors of said company*, shall cause bonds "to be issued," etc.

This statute constituted the authority of the town to subscribe for the stock of the company to be paid for in its bonds, and of the corporation on the other hand to accept the subscription of a municipal corporation to be paid in its bonds otherwise unauthorized.

Prior to the subscription for the $10,000 of stock in question, the constitution of Illinois of 1870 went into force. One of the sections provides:

"No county, city, town, township or other municipality *shall ever become subscriber to the capital stock of any railroad* or private corporation, or make donation to, or loan its credit in aid of such corporation."

This provision was not only a withdrawal of the authority given by the act of 1869, but an express prohibition, and it has been repeatedly held that any subscription by a municipality made subsequent to the date it went into effect was void.

Wade v. *Walnut*, 105 U. S., 2. and cases cited.

And this court held as a consequence that the bonds issued in payment of this particular subscription, were absolutely void in the hands of the complainant in this case, although a purchaser for value without notice.

Wade v. *Walnut*, 105 U. S., 1.

It follows that the town did not become the holder of $10,000 of the stock of this railroad company by the subscription of August 6, 1870, and its acceptance by the company. As we have seen, this subscription was not only unauthorized, but expressly prohibited by the constitution.

The subscription, therefore, being prohibited by law and wholly void, did not make the town a stockholder. It became subject to none of the obligations, and acquired none of the rights of a stockholder.

And it follows that neither the delivery of the void bonds in payment of the void subscription, nor the issuing of the certificate as evidence of the void obligation could make it a stockholder.

The bonds recited on their face that they were issued in pursuance of the void subscription, and the town has since successfully repudiated them on the ground of their invalidity.

The stock certificate, as we have seen, was only evidence of the relation supposed to have been created by

the void subscription and its acceptance (see authorities cited *supra*) and was only part of a prohibited and void transaction.

The complainant does not claim that he ever became a stockholder of the defendant. He only asserts that he should be subrogated to the rights of the town, and his case necessarily proceeds upon the theory that the town became, by this prohibited and void transaction a holder of $10,000 of the capital stock of the company. If therefore, we have established that the town did not become such a stockholder, the whole case falls to the ground.

To decree that the complainant is entitled to the stock and to have a certificate issued to him for it, is to enforce the prohibited and void contract of subscription.

The bonds have been adjudged void, because issued in pursuance of the prohibited subscription. If the action of the town in issuing the bonds was void, its action in agreeing to take the stock was equally so. Either the transaction was void or valid. It cannot be held void as to the bonds, and valid as to the stock, or void in favor of the town, and valid as against the railroad company.

In fact the town, the railway company, and the holders of the bonds were *particepes criminis* in the act of violating the constitutional prohibition, and no rights or obligations could grow out of the prohibited and unlawful transaction of subscribing for the stock and issuing the bonds in payment.

Litchfield v. *Ballou*, 114 U. S., 190.

In *Stace and Worth's* case, L. R., 4 Cha. App., 682, (cited and quoted with approval in *Scoville* v. *Thayer*, 105 U. S., 143), there was an illegal

amalgamation of two corporations. And certificates for shares in the amalgamated company were issued.

Vice-Chancellor JAMES said:

"This was a void agreement, with a void acting upon it, a void recognition and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix those gentlemen on the list of stockholders."

Where a claim is made to stock which for any reason is void, it is not only the right, but the duty of the corporation to assert the invalidity of the stock, both in its own interest and in the interest of the holders of valid stock.

Rorer on Railroads, Sec. 17, and authorities cited.

And the invalidity of the stock is a good defense to a proceeding by mandamus to compel the corporation to issue a new certificate to the transferee of the certificate evidencing the illegal issue.

People v. *Sterling Manufacturing Co.*, 82 Ill., 457.

Or it may file a bill to have the stock decreed void and the certificates canceled.

Rorer on Railroads, Sec. 17, and authorities cited.

But it may be said that it is inequitable that the railroad company should receive the benefit of its sale of the void bonds, and at the same time defeat the stock, and that the company should therefore be estopped from denying that the town became a stockholder.

If the railroad company has received any money which it is inequitable that it should retain, it was not the town's

money; the town has successfully resisted the payment of its bonds on the express ground that the transaction of the subscription to the stock was prohibited and void.

If the company obtained on void bonds money which it is inequitable that it should retain, the person who paid the money would have a right of action to recover it back.

And this right of action we may assume, for the purpose of the argument, would pass by the transfer of the bonds and vest in the complainant. But this suit is not brought to enforce any such right. The right, if it exists, can only be enforced by an appropriate action at law.

Litchfield v. *Ballou*, 114 U. S., 190.
N. Y. Guaranty Co. v. *Memphis*, 107 U. S., 205.

Nor does it follow that if the railway company has received money which it is inequitable that it should retain, that therefore a court of equity should create a remedy to right a supposed wrong by decreeing that this company issue to the complainant, because he purchased $10,000 of the void bonds, a certificate for $10,000 of valid stock.

The argument for complainant in the court below was in effect that it was wrong that this money should not be paid to him by some one, and as it was not just that this company should have the benefit of the $10,000 of stock which it agreed by a void and prohibited contract to issue, a court of equity which affords a remedy for every wrong should seize $10,000 of the stock of the company and deliver it to the complainant.

But we deny that a court of equity, any more than a court of law, can give rights of action based upon sup-

posed moral obligations or general principles of abstract justice.

See, *Heine* v. *Levee Commissioners*, 19 Wall., 660, and *Reese* v. *City*, 19 Wall., 121, cited *supra*.

Again, it is of the very essence of stock that the corporation shall have received the money or a valid obligation to pay the money which the stock represents.

As we have seen, the town did not become bound by its subscription. The subscription was wholly void and imposed no obligation on the town. It is conceded that the town paid no money, and that the only obligations which it gave (the bonds) were void, and their payment has been successfully defeated on that ground.

It is true that the railroad company subsequently received some amount from the sale of the void bonds; but this did not validate the void transaction between the town and the railroad company, nor create stock where there was no stock before.

This was a subsequent and independent transaction between different parties, and that it could not operate as a taking of the stock is shown:

(1.) By the admitted fact that the money paid by the complainant was not paid in payment for stock, but as the purchase price of certain void bonds bought by him in the open market, which he believed to be valid. The complainant does not claim that he thereby became a stockholder. His only claim is to be subrogated to the rights which it is assumed the town had acquired by its void subscription and delivery of void bonds.

(2.) By the fact that there is no necessary relation between the amount paid for the bonds and the amount for which alone the corporation could issue stock, viz.:

par. If this stock is to be treated as valid stock because a sum of money was paid to the company for the void bonds, the result would follow equally, whether the amount paid for the bonds was par, or ten cents on the dollar.

The court is asked to treat this stock as valid stock, and decree that the company issue a new certificate for valid shares. In the case supposed the company would only receive ten cents on the dollar for the stock and there would be no outstanding obligation by any one to pay the balance. The effect, therefore, would be to create stock without payment for it, in fraud of the law, of the rights of other stockholders, and of creditors. There would be outstanding stock without the corresponding funds in the treasury of the company, either in money or valid obligations to pay, without which there can be no valid stock. If the law authorizing subscriptions and payment by municipal bonds had been held valid, there would have been the bonds or the money representing them, which, whether worth ten cents, or worthless, would have been an authorized subscription and payment.

The plain fact here is that the money paid to the company was not paid or intended to be paid on account of any stock.

It was paid as the purchase price of certain void bonds, and if the payment was made under such circumstances that the complainant has no remedy, he took the risk of the validity of the bonds and paid his money for the chance, and that is no reason why a fiction should be resorted to which leads to such inconsistent and absurd results.

By this proceeding, the complainant, while asserting

the invalidity of the bonds as contrary to law, as his ground for relief, seeks to assert the validity of the stock. Either the transaction was void or valid. It could not be void as to the bonds and valid as to the stock.

In fact the towns and the railroad company were *participes criminis* in the act of violating the constitutional prohibition, and the entire transaction, whereby the town made and the company accepted the prohibited subscription, and the town issued its bonds and the railway company its certificate of stock, in consummation of the prohibited subscription, was unlawful and void.

Litchfield v. *Ballou*, 114 U. S., 190.

Ætna Life Ins. Co. v. *Middleport*, 124 U. S., 532.

IT IS CONTENDED THAT THE RAILROAD COMPANY IS ESTOPPED FROM DENYING THE VALIDITY OF THE STOCK.

There are several answers to this objection:

(1.) We have shown that the transaction by which the town attempted to become a stockholder was prohibited by law, and that therefore the town never became a stockholder.

There is no estoppel on the law.

In town of *South Ottawa* v. *Perkins*, 94 U. S., 260, it was held, that the corporation was not estopped from asserting the invalidity of its bonds against bondholders who had paid their money on the faith of the bonds themselves. The court held that the bondholders were chargeable with notice that the law was void, and that there could be, and was no estoppel.

And in town of *Walnut* v. *Wade*, 105 U. S., 1., the

court in holding the bonds void in the hands of a purchaser for value necessarily held that there could be no estoppel on the law.

The stock is void for the same reason that the bonds are void. The same prohibition in the constitution which made the bonds void, made the subscription and the attempted issue of a certificate of stock to the town under it, wholly void. The complainant has the same notice of the invalidity of the stock, as of the invalidity of the bonds. And there is less reason for asserting the estoppel as to the stock, on the faith of which no money was paid by the complainant than there was for asserting it as to the bonds on which the complainant relied in paying his money.

(2.) The complainant claims to be subrogated to the rights of the town.

If he has any standing in court, it is on the ground that he is subrogated to the supposed rights of the town.

It is a familiar principle that where an alleged subrogation is claimed, the party entitled to the subrogation acquires no greater rights than those of the party for whom he is substituted.

Sheldon on Subrogation, Section 6.

Clearly the town, having repudiated the bonds as void and obtained an adjudication of their invalidity on the ground that the subscription itself was void, could not be heard to claim in a subsequent proceeding that the subscription was valid and enforce against the railroad company the rights of a stockholder.

(3.) We have seen that it is fundamental that a person claiming to be subrogated to the rights of another can assert no greater rights than those of the person for

whom he is substituted. The question is, therefore, whether the company is estopped as to the town. If, as we have seen, it is not, then there is no estoppel.

But if we assume that the estoppel is to be determined with reference to the complainant, two at least of the essential elements of an estoppel are wanting.

To constitute an estoppel there must be a representation of fact. Here there was no representation to the complainant whatever as to the stock. Whatever representation there was, if any, was made as to the bonds. That representation was solely a representation of law (not made by either of the defendants) and if a ground of action at all, would be a ground of action on the bonds.

Another essential element of an estoppel is that the party must have acted on the faith of the alleged representation which it is claimed that the other party is estopped from denying. Here it is neither claimed nor alleged that the complainant did any act on the faith of the validity of this supposed stock.

In fact, at the time the complainant paid his money, the stock stood as it was originally issued, in the name of the town, and the transaction by which alone he seeks to connect himself with it was itself notice of its invalidity.

III.

THE ALLEGED RIGHT OF ACTION TO RECOVER THE STOCK IS BARRED BY SECTION 15 OF THE STATUTE OF LIMITATIONS OF ILLINOIS.

This section provides that actions on unwritten contracts, etc., "and all civil actions not otherwise provided "for shall be commenced within five years next after the

"cause of action accrued." (Starr & Curtis Stat., Vol. 2, 1552.)

The bill alleges and the proof shows that the complainant purchased the bonds in 1871. It is this purchase by him of the bonds, the fact that the bonds were void, and that the town received for them the shares of stock, which gives him his alleged interest in the stock, and constitutes his cause of action.

The bill was not filed until March, 1885.

The facts which constitute his alleged cause of action all arose at and before the time when he purchased the bonds, in 1871. It was his purchase of the void bonds which gave him his alleged equity in the stock, if anything did.

In any view he alleges no act done by him or by the town or by the railroad company, or fact occurring within five years before the filing of the bill which can by any possibility form an element in his right of action.

The only fact alleged or proved which occurred within five years was the decision by this court in *Wade* v. *Walnut*, in 1881.

But it is only the *fact* of the invalidity of the bonds which can by any possibility constitute an element in the alleged cause of action. His cause of action, if it exists at all, existed before as much as after that decision.

In fact, the decision was only an affirmance of a judgment by the Circuit court of the invalidity of the bonds, which was rendered in 1879. In reality, the decision is of no importance, except as conclusive evidence of the fact which existed before, viz., the invalidity of the bonds.

Again, if a decision of the question of the invalidity

was material to the cause of action, the question was decided by the Supreme court of Illinois, in *Schall* v. *Bowman*, 62 Illinois, decided in 1872; and, again, in *Richards* v. *Donaghue*, 66 Illinois, 73, decided in the same year. And the decision by the this court in *Wade* v. *Walnut*, only purports to follow these decisions as conclusive upon it. In fact, this court had itself also ruled the same way in *Town of Concord* v. *Savings Bank*, 92 U. S., 629, decided in 1875.

But how, by any possibility, can the issue of a suit brought to recover on some of the coupons of these void bonds (for such was *Wade* v. *Walnut*) constitute an essential element in the alleged cause of action to establish an equitable ownership or interest in these shares of stock?

It may be argued that a demand by complainant on the Grand Trunk Company was essential to the cause of action, and that until such demand the cause of action did not accrue.

There are two answers to this argument:

(1.) The argument proves too much. The bill alleges no such demand, and there is no evidence that it was ever made. If a demand was necessary, before the cause of action could arise, the complainant has not established any ground for relief.

(2.) The complainant purchased the bonds in 1871. The present bill was not filed until March, 1885.

If a demand was necessary as a condition precedent to complainant's alleged right of action against the Grand Trunk Company, we insist that complainant could not lie by, as he did, for fourteen years, without making any demand, and then contend that the statute did not bar his rights.

The weight of authority holds that where a demand is necessary as a condition to a plaintiff's right of action, such demand must be made within the same period of time as that prescribed by the statute of limitations for bringing suit on the cause of action itself.

See,

Palmer v. *Palmer*, 36 Mich., 487.
Lo Forge v. *Jayne*, 9 Barr., 419.
Burst v. *Burnett*, 16 Hun., 409.
R. R. Co. v. *Byere*, 32 Pa. St., 22.
Morrison v. *Mullin*, 34 Pa. St., 12.
Stafford v. *Richardson*, 15 Wend., 305.
Codman v. *Rogers*, 10 Pick., 112.
Lyle v. *Murray*, 4 Sandf., 590.
Angell on Limitations, sec. 96.

Under the rule laid down in these cases it is clear that the present complainant is barred by the statute. The time for making such demand expired in 1876, nine years before this action was brought. Even under the rule apparently laid down in two cases (*Keithler* v. *Foster*, 22 Oh. St., 27; *Thrall* v. *Mead*, 40 Vt., 540), that the effect of the failure to make a demand within the period prescribed for suing on the cause of action itself, is not to bar the right of action, (as held by the weight of authority above cited,) but only to set the statute of limitations in motion, the present complainant is, nevertheless, barred. Under this latter rule (see *Keithler* v. *Foster*, and *Thrall* v. *Mead*, *supra*), the statute began to run, in the present case, in 1876, and complainant's rights were barred in 1881, four years before the bringing of the suit.

The cause of action having accrued more than five years before the filing of the bill, the sole remaining

question is, does section 15, which fixes the limitation at five years, apply?

(1.) A bill in equity is a "civil action" within the meaning of the statute. This bill is therefor barred by the express terms of the statute.

That a bill in equity is a "civil action" within the meaning of the statute, see the following cases under similar statutes:

Lord v. *Morris*, 18 Cal., 486.
White v. *Sheldon*, 4 Nev., 289.
Hardy v. *Hardin*, 4 Sawyer, 548.
Pitcher v. *Flinn*, 30 Ind., 203.
Coddington v. *R. R. Co.*, 103 U. S., 409.

If the word "action", in section 15, was used in the narrow sense of action *at law*, why was the same word "action" used in section 11, as applied to suits to foreclose mortgages?

(2.) Even if the particular section does not in terms extend to suits in equity, it is well settled that where the remedy at law is barred by the statute, the remedy in equity will also be barred by analogy.

Nor. Ill. C. & I. Co., v. *Young*, 11 Biss., 333.
Godden v. *Kimmell*, 99 U. S., at 201 and 210.
School Directors v. *School Directors*, 105 Ill., 655.
Illet v. *Collins*, 103 Ill., 77.

This suit must be treated either as a suit by the complainant to recover his money, or as a suit to compel the company to transfer the shares, and issue a new certificate.

If it is treated as a suit to recover the money, it is clear that the remedy at law would be barred, and as a consequence, the remedy in equity.

School Directors v. *School Directors*, 105 Ill., 653.

Carroll v. *Green*, 92 U. S., 509.

If it is treated, as it purports to be, as a suit to compel the company to transfer the stock and issue a new certificate, there is the appropriate and recognized remedy at law by mandamus.

People ex rel v. *Manufacturing Co.*, 99 Ill., 355.

People v. *Sterling Manufacturing Co.*, 82 Ill., 457.

Wood's Railway Law, Sec. 98.

And it has been expressly decided that a petition for mandamus is an "action" within the meaning of the statute of limitations.

Board of Supervisors v. *Gordon*, 82 Ill., 435.

It follows that the mandamus being a "civil action" within section 15, would be barred after five years, and that the remedy in equity would therefore be also barred.

JOHN J. HERRICK,
Attorney for Appellant.

Office Supreme Court U. S.
FILED.
MAR. 23 1891
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 252.

THE ILLINOIS GRAND TRUNK RAILWAY, *Appellant*,

vs.

JEPTHA H. WADE, *Appellee.*

Appeal from the Circuit Court of the United States, for Northern District of Illinois.

BRIEF AND ARGUMENT FOR J. H. WADE.

GEORGE A. SANDERS,
Attorney for J. H. Wade.

THOMAS S. MCCLELLAND,
Of Counsel.

SPRINGFIELD, ILL.:
H. W. ROKKER PRINTER AND BINDER.
1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 252.

THE ILLINOIS GRAND TRUNK RAILWAY, *Appellant*,

vs.

JEPTHA H. WADE, *Appellee.*

Appeal from the Circuit Court of the United States, for Northern District of Illinois.

BRIEF AND ARGUMENT FOR J. H. WADE, Jr.

The issues involved in cases No. 251 and 252 of this term are the same, and the same relief is sought by the appellee in both cases.

They can, therefore, both be argued in one brief, or, rather, the argument on behalf of appellee in case No. 251 will apply to case No. 252; the determination of the former case will necessarily conclude the latter.

STATEMENT.

On June 25, 1870, *The Town of Lamoille* voted to subscribe $30,000 to the capital stock of *The Illinois Grand Trunk Railway*, and to issue bonds in payment therefor.

On August 6, 1870, the same town voted to subscribe a further sum of $10,000 to the same railway, and to issue bonds in payment therefor.

On February 1, 1871, the town subscribed for $40,000 of the stock of the railway, and a *single* certificate for that amount was executed and delivered to it, in payment for which the town executed and delivered to the railway $40,000 in bonds.

On March 1, 1871, appellee became the purchaser of all the bonds, numbered from 31 to 40, both inclusive, being for $1,000 each, voted Aug. 6, 1870, amounting to $10,000.

On July 2, 1870, between the first and second elections above noted, the people of Illinois voted to ratify a new constitution and certain amendments wherein municipalities were prohibited from voting aid to railway and other private corporations. The new constitution went into force August 8, 1870, and the prohibitory amendment has been held as in force when voted July 2d, 1870.

Under this section of the constitution of 1870 this court held bonds *valid*, voted June 25, 1870.

Walnut v. *Wade*, 103 U. S. 683.

Under the same section His Honor, Judge Blodgett, sitting as Circuit Judge in the Northern District of Illinois, held bonds *invalid* voted Aug. 6, 1870.

On appeal to this court that cause was affirmed, this court *declining to pass upon the question presented by the record.*

Wade v. *Walnut*, 105 U. S. 1.

The town paid its bonds, numbers 1 to 30, amounting to $30,000, but has never paid those numbered from 31 to 40, amounting to $10,000.

When the bill was filed in this case the town still owed its interest in the certificate of stock represented by this $10,000 voted Aug. 6, 1870, and was ready, willing and anxious to assign and turn it over to Wade, if Wade would deliver up the $10,000 bonds, but that part of the stock representing this $10,000 void bonds was included in the single certificate of stock for $40,000, and the railway would not take up this certificate and issue two others for $30,000 and $10,000, respectively, so as to enable the town to assign to Wade the $10,000 of stock in exchange for its bonds for $10,000, issued under the vote of Aug. 6, 1870; neither would the town institute *mandamus* proceedings against the officers of the railway to compel them to take up the certificate for 400 shares, and issue other certificates for 300 and 100 shares, respectively, whereby it could assign to Wade the certificate for 100 shares and receive from him the $10,000 bonds which had been given to the railway in consideration for this 100 shares of stock, but left Wade to his remedy in chancery against

the town and the railway to be subrogated to the rights of the town in and to so much of the certificate of stock as was represented by the $10,000 bonds held by Wade.

The town concedes the relief prayed for by Wade in this bill filed herein, but the railway denies the right of Wade to the stock, notwithstanding it had received full consideration for the stock in bonds now held by Wade, which the appellant railway had, on receipt of same in 1871, turned over to the C., B. & Q. R. R. Co. in part payment for constructing appellant's road.

The Court below, Mr. Justice Harlan, found for Wade and decreed the relief prayed for in his bill, from which the railway appealed, the town acquiescing in the decree.

The records in these cases are condensed, and the facts are set forth as briefly as could be here done, and reference is made thereto.

ARGUMENT.

The appellee in these cases relies largely upon a clear understanding of the facts by the Court for an affirmance of the decrees of the Court below.

In 1871, appellee bought in open market, for practically full face or *par* value—in good faith and without any notice of existing infirmities—$10,000 of the bonds of each of the towns of Lamoille and Walnut, which had been delivered to appellant for capital stock in its railroad, and by it turned over to the Chicago, Burlington & Quincy Railroad Company, as part pay for constructing its road,

and this lattter company, either through its officers or agents, sold the bonds to appellee. These bonds were voted by the people of the towns at a time when they were prohibited by the Constitution from granting aid to railway and other private corporations, as determined by the Courts of Illinois and by the Circuit Court of the United States for the Northern District of Illinois, but as yet undecided by the Supreme Court of the United States, *except indirectly in its declination to pass upon the question.* The appellant having received full consideration for this stock, and appellee becoming the owner of the bonds in good faith, for a valuable consideration and without notice, and being wholly unable to collect the amount due on the bonds —the towns having repudiated their payment—not upon any meritorious grounds, but upon a legal construction of a constitutional provision by a court of subordinate jurisdiction—*i. e.*, a Circuit Court of the United States—and receiving no relief from the Court of Appeal to which Wade took *Wade* v. *Walnut*, 105 U. S. 1, the appellee now asks that, upon a surrender to the makers of the bonds thus declared void he be subrogated to the rights of these towns of Lamoille and Walnut in and to the railroad stock issued and delivered to the towns in consideration of the bonds, which appellant turned over for their face or *par* value in the construction of its road.

This is satisfactory to the towns and is desired by them.

The appellant cannot and does not set up any infirmity in the stock. It realized full value therefor. It relies wholly upon the invalidity of the bonds alone as a defense to this

suit. If the towns of Walnut and Lamoille were setting up this defense—although inequitable and unjust—there would be some show of consistency in the act, but it is difficult to see what standing appellant has in a court of justice in relying upon such a defense.

The appellant having received and sold the bonds for their full or face value, the subsequent holders succeeded to the rights of the towns in the stock—the consideration for the bonds—and as incident to the ownership of the bonds.

So long as the towns—the legal owners of the stock—are willing that appellee shall have what benefit, or advantage there may be in the stock, the identical property which appellant turned over in consideration of the bonds, and upon which it realized full value, the conduct of appellant in throwing obstructions in the way of accomplishing that purpose and seeking to defeat that end, is repugnant to every sense of right, and ought not to be tolerated in a court of justice.

Louisiana v. *Wood*, 102 U. S. 294.
Hitchcock v. *Galveston*, 96 U. S. 341.
Marsh v. *Fulton*, 10 Wall. 684.

We think the rulings in *Parkersburg* v. *Brown*, 106 U. S. 487, are in point. As we understand the rule established in that case the holder of void bonds is entitled in equity to the property for which the bonds were given, or exchanged. See also *Chapman* v. *Douglass County*, 107 U. S. 348. If this is the correct interpretation of that case then appellee should be substituted for the towns of Lamoille

and Walnut in the ownership of this stock—especially as the towns are consenting thereto, and no one objects, except appellant, which declines to enable appellee, the towns, to effectuate their desires by taking up the certificate for 400 shares and issuing others so that the towns might turn over to appellee an amount equal to that of the bonds held by him, and which have been declared void.

If the bonds had been declared void in the hands of appellant, no one would doubt its right to have the stock issued and delivered to the town in consideration of the bonds surrendered and canceled.

Campbell vs. *Morgan*, 4 Bradwell (Appellate Court Reports of Illinois), 100, and cases.

In other words, the appellant would be entitled to the money represented by the bonds, or to the stock.

But appellant realized full value on the bonds, and it has no legal or equitable claim on the stock. As between the towns and appellant, there are no equities existing. The stock in the hands of the towns is as valid as if the bonds were valid and had been paid. Appellant has suffered no loss. Appellee, as the ultimate owner of the bonds, is the only one who has suffered a pecuniary loss, and now, with the consent of the towns, the legal and equitable holders of the stock seeks to be substituted to the rights of the towns in the stock. His remedy is wholly in chancery. He has no action at law.

If the appellant held these bonds which were voted Aug. 6, 1870, as the same had been adjudicated invalid in its hands no one would question the proposition that the town could not successfully assert property interest in the stock—the consideration for the bonds—but in equity would be compelled to surrender and cancel that part of the stock represented by the void bonds. In other words, the consideration having failed the appellant would be entitled to a recision of the contract and a re-delivery of its stock.

But appellant has not been injured in the transaction. It reaped the same benefit from the bonds as if they had been legal and binding obligations against the towns. Appellant turned these bonds over to the C., B. & Q. R. R. Co., or to James F. Joy, in payment for constructing the road, and the C., B. & Q. R. R. Co., or Joy, realized the currency upon the bonds by selling them to appellee for nearly their face value.

Why should not appellee stand in the same relations with the towns that the appellant would were it the holder of these bonds, and be substituted for the towns in the ownership and control of this stock, especially when the towns are willing to do so on the surrender of their bonds—the only obstruction in the way being the refusal of appellant to accommodate itself to the necessities of the case by taking up its certificate for $40,000 of its stock and issuing two others for $30,000 and $10,000, respectively, and thus enable appellee and the towns to effect their purposes?

It seems to us that a further discussion of this case is unnecessary, and that the decree of the Court below should be affirmed with costs.

The R. R. Company received full value for the stock. It has no right to it. The town is the legal owner of the stock and Wade is the equitable owner of it, as it was his money that ultimately paid for the stock.

GEORGE A. SANDERS,
Attorney for J. H. Wade.

THOMAS S. MCCLELLAND.
Of Counsel.